CHUA WENG MENG

v.

WONG KOK KONG

HIGH COURT MALAYA, TAIPING
ZULKEFLI MAKINUDIN J
[CIVIL APPEAL NO: 12-4-1998]
11 FEBRUARY 1999

CIVIL PROCEDURE: *Judgments and orders - Alteration of - Power of court to recall and review order made - In what circumstances - Discretion of court to vary order of costs - Whether exercised correctly*

The appellant appealed against the decision of the Sessions Judge who having earlier allowed the respondent's claim as a plaintiff with costs, subsequently recalled it on the application of the respondent and varied it to taxed costs. It was argued by the appellant that although the Sessions Judge had the discretion by virtue of O. 48 r. 9(2) of the Subordinate Courts Rules 1980 ('SCR') to grant taxed costs, it should have been made at the date the decision was pronounced and not subsequently. Also that having pronounced costs awarded to the respondent, ie, fixed costs, the Sessions Judge was *functus officio* when he subsequently varied this order to taxed costs. However, the Sessions Judge was of the view that he was entitled to vary the order as it was not perfected.

Held:

[1] The application to recall the judgment or order for the purpose of reviewing must be done expeditiously. The power to recall an order which has not been passed and entered should be sparingly exercised if such issues for further consideration can be left to be dealt with by way of appeal to the Court of Appeal. There must be an intervening act or event from the day the order was pronounced to the day when the order was recalled for review, and an unperfected order is recalled when there is some doubt regarding the correctness of the order as orally pronounced. Further, where necessary, justice of the case may require it to be reviewed.

[2] In this instance, it could not be said that the decision to recall the order as to costs was not done expeditiously. Also, the Sessions Judge was justified in varying the order, having regard to the facts established before him and having acted in accordance with O. 48 r. 9(2) of the SCR.

[2a] Further, justice of the case also required the order to be recalled and varied as there was a doubt as to the applicability and enforceability of the order. This was in view of the fact that the judgment sum awarded to the respondent was RM207,742 whilst the maximum allowed under the fixed scale of costs pursuant to O. 48 r. 12 of the SCR was only for a judgment sum not exceeding RM100,000. To limit the amount of costs to RM100,000 would cause injustice to the respondent.

[Appeal dismissed.]

Case(s) referred to:

Bastow v. Bagley & Co Ltd [1961] 3 All ER 1101 ***(refd)***
Canopee Investment Pte Ltd & Ors v. Landmark Holdings Berhad & Ors [1990] 1 CLJ 466 ***(foll)***
Chee Kuan Cheng v. Chuo Kong Kah [1967] 1 MLJ 74 ***(refd)***
Chua Wah Keow v. Ng Ho Huat & Anor [1961] MLJ 321 ***(refd)***
Lalchand Nathermal v. Kamaluddin Bin Maamor [1991] 1 CLJ 42 ***(refd)***
Lim Yam Teck v. Lim Swee Chiang & Anor [1979] 1 MLJ 162 ***(refd)***
Millensted v. Grosvenor House (Park Lane) Ltd [1937] 1 All ER 736 ***(refd)***
Re Barrel Enterprise & Ors [1972] 3 All ER 631 ***(refd)***
Re Harrison's Share Under A Settlement, Harrison v. Harrison Settlement [1955] 1 All ER 185 ***(refd)***
Re XL Petroleum Lty Ltd [1971] Vr 560 ***(refd)***
Seong Fatt Sawmill Sdn Bhd v. Dunlop Industries Sdn. Bhd. [1984] 1 CLJ 291 ***(refd)***
Tomlinson v. Commissioner of Taxation [1977] 7 ATR 639 ***(refd)***

Legislation referred to:

Subordinate Courts Rules 1980, O. 29 r. 9(4), O. 48 rr. 9, (1), (2), 12, O. 49 r. 9(2)

For the appellant - VK Dasaratharaj; M/s VP Nathan & Partners
For the respondent - Dalgit Singh; M/s Gurdev Dalgit Su & Co

Reported by Usha Thiagarajah

JUDGMENT

Zulkefli Makinudin J:

This is an appeal by the appellant as a defendant against the decision of the learned Sessions Court Judge in Taiping delivered on 30 December 1997 wherein having earlier allowed the respondent's claim as a plaintiff with cost on 28 January 1997, he later proceeded to decide that the cost so awarded should be varied to taxed cost. In this case judgment was entered for the respondent after a full trial in an action for negligence arising from a motor accident against the appellant. It was also ordered that the respondent was entitled to the cost of the action. However before the order could be perfected there was a dispute as to the costs that the respondent was entitled to. The

total judgment sum that was awarded to the respondent was RM207,742 which was well in excess of RM100,000. The fixed scale of costs is as set out under O. 48 r. 12 of the Subordinate Court Rules 1980 ("SCR") whereby it is fixed in proportion to the quantum of the subject matter of the action and is limited up to RM100,000. The present predicament as I see it is created when the jurisdiction of the Sessions Court was amended to award an unlimited amount in the case of running down matters such as the present case but the scale of cost under O. 48 r. 12 of the SCR has not been amended accordingly. Since both the appellant and the respondent could not agree as to the costs payable to the respondent an application was made by the respondent by way of a letter dated 18 July 1997 to the learned Sessions Judge who tried the case to settle the dispute on the said issue of costs pursuant to O. 29 r. 9(4) of the SCR.

Before the learned Sessions Judge it was argued for the respondent that the fixed scale of cost as set out under O. 48 r. 12 of the SCR could be taken into account by adding the amount awarded for RM100,000 and then adding for the balance. However the learned Sessions Judge found that this is not right as the scale of costs is on a diminishing scale and that again is not how costs were intended to be awarded. For the appellant it was argued that since the fixed scale of costs is granted only up to RM100,000 the maximum that can be allowed is only up to RM100,000. The learned Sessions Judge found that although this would be the easiest way out of this problem it cannot be justified as the scale of costs stated in the said O. 48 r. 12 of the SCR clearly specifies that it is for judgment sum not exceeding RM100,000. Hence the learned Sessions Judge could not agree with the appellant's submission. The learned Sessions Judge finally decided that costs ought to be taxed.

The main issue to be decided in this appeal is whether the learned Sessions Judge was empowered as he did in this case to recall the earlier order as to costs pronounced and varying it when the judgment had not been perfected. The secondary issue is whether in the circumstances of this case the learned Sessions Judge had judicially and correctly exercised his discretion in varying the order of costs to taxed costs. At the outset it is necessary to refer to the relevant provision of O. 48 r. 9 of the SCR on the determination of costs which reads as follows:

> (1) Subject to this Order, where by or under these rules or any order or direction of the Court costs are to be paid to any person, that person shall be entitled to his fixed costs.
> (2) Paragraph (1) shall not apply to costs which by or under any or direction of the Court are to be taxed by a Judge.

I am of the view that the effect of O. 48 r. 9 of the SCR is that a party to an action is entitled to his fixed costs as laid down in O. 48 r. 12 of the SCR where an order or direction is made by the court as to payment of costs in the usual way without specifying the kind of costs that party is entitled to, but, where there is a direction that a party is entitled to costs taxed by a judge then the costs ought to be taxed. In the present case the learned Sessions Judge when he first pronounced judgment entered for the respondent he had made an order as to payment of costs in the usual way without specifying the kind of costs that the respondent was entitled to. Only upon an application made by the respondent to the learned Sessions Judge to settle the dispute as to costs that he decided to vary his order to taxed costs. It is therefore clear that the costs as first pronounced by the learned Sessions Judge must be fixed costs under the aforesaid provision of O. 48 r. 9(1) of the SCR. However O. 48 r. 9(2) of the SCR gives a discretion to the trial judge to grant that costs be taxed to any person. The learned counsel for the appellant submitted that even assuming there was such a discretion, then the said discretion should be pronounced at the date the decision was pronounced and not subsequently. It was also submitted for the appellant that the learned Sessions Judge having pronounced costs awarded to the respondent which means fixed costs was *functus officio* when he subsequently varied this order to taxed cost. However the learned Sessions Judge took the view that if an order is not perfected he is entitled to vary the said order.

I shall henceforth proceed to distinguish the case authorities relied upon by both parties as regards the discretionary power of the court to recall and vary an order that has not been perfected. A comprehensive study of all the cases cited by both parties showed that it may be argued that the rule laid down as it is in such wide terms confers upon a judge an unlimited power to withdraw, alter or modify an order made by him which has not yet been perfected. In this regard I would like to refer to the judgment of Ong Hock Thye FJ (as he then was) in the case of *Chee Kuan Cheng v. Chuo Kong Kah* [1967] 1 MLJ 74 wherein at p. 75 his lordship stated as follows:

> moreover the order has not been drawn up and entered. Until an order is perfected the Courts jurisdiction to review the subject matter and to recall an order pronounced is undoubtedly a matter of wide discretion.

However on this point his lordship Justice Tan Ah Tah in delivering the judgment of the Singapore Court of Appeal in the case of *Chua Wah Keow v. Ng Ho Huat & Anor* [1961] MLJ 321 at p. 322 had this to say:

> But a perusal of the cases in which the power has been exercised indicates that the power is not as untramelled as it appears to be. In all these cases something transpired between the pronouncement of the order and the perfecting of it which showed that there was some error in the order pronounced.

The following passage quoted from the judgment of the Court of Appeal in *Re Harrison's Share Under A Settlement, Harrison v. Harrison Settlement* [1955] 1 All ER 185 at p. 323 is also relevant to the point under consideration:

> It is important to remember that in the ordinary way, the recall of an unperfected order results in a rehearing of which parties can present such further arguments as they may be advised having regard to the matter, whatever it may be, which is sought to cast doubt on the correctness of the order as orally pronounced.

In *Lim Yam Teck v. Lim Swee Chiang & Anor* [1979] 1 MLJ 162 the learned trial judge Kulasekaran J at the end of the hearing of the case dismissed the plaintiff's action with costs. In so doing he took the view that as the only damage to the motor pick-up was on the rear just above the nearside tail light, this indisputable fact could not possibly fit in with the plaintiff's version of the accident and therefore he preferred the defendant's version of the accident. After the learned judge had dismissed this action he was not too happy with the end result and that same afternoon he directed his personal assistant to inform both counsels not to treat the matter as concluded and final as he would like to hear further submissions from them. Having heard the submission of both counsels the learned judge took the view that his earlier decision should be varied as the plaintiff's version is not altogether inconsistent and irreconcilable with the damage found on the motor pick-up. The learned trial judge thereafter found the first defendant was entirely to blame for the accident and ordered that judgment be entered in favour of the plaintiff. In *Millensted v. Grosvenor House (Park Lane) Ltd* [1937] 1 All ER 736, the judge gave judgment for £50 plus cost. The following day the judge said that he thought £50 was excessive and he reduced it to £35. The Court of Appeal accepted that judgment can be recalled at any time until it has been drawn up. In *Bastow v. Bagley & Co Ltd* [1961] 3 All ER 1101, two decisions of the Court of Appeal had been given within a few days of each other giving markedly different decisions as to the appropriate damages for the loss of an eye. One division there upon reconsidered its decision and varied it to correspond with the other so as to avoid the injustice as between the two sets of litigants of one award being out of all proportion to the other. In refering to a variation of a decision after judgment delivered, Russell LJ in *Re Barrel Enterprise & Ors* [1972] 3 All ER 631 at p. 637 had this to say:

> It is clearly not permissible for a party to ask for a further hearing merely because he has thought of a possible ground of appeal that he originally overlooked. The discovery of fresh evidence has never been suggested as a ground for reopening the argument before the Court of Appeal. If fresh evidence comes to light, of such a character as to call for further consideration of the issues, the right way to deal with the situation is by applying for leave

a to appeal to the House of Lords, see *Murthy v. Stone Wall Work (Charlton) Ltd* (1969) 2 All ER 949, or if such appeal be not available in a contempt case, then by application for release.

In *Re XL Petroleum Lty Ltd* [1971] Vr 560 it was held that having regard to the extensive rights of appeal now conferred on parties, the power to recall b an order which has not been passed and entered is one which should be sparingly exercised particularly if the judgment of the court was appropriate having regard to the facts established before it and in accordance with the relevant law. In *Tomlinson v. Commissioner of Taxation* [1977] 7 ATR 639, it was held that the power of court to review an order which has not been c perfected can only be exercised judicially and on sufficient ground. In *Lalchand Nathermal v. Kamaluddin Bin Maamor* [1991] 1 CLJ 42 Abdul Malek Ahmad J (as he then was) stated at p. 46:

> A careful consideration of the cumulative effect of all these could appear to be that once a judgment is pronounced, it cannot be altered except by discretion d in Specific Situation ...

In the case of *Seong Fatt Sawmill Sdn Bhd v. Dunlop Industries Sdn Bhd* [1984] 1 CLJ 291 his lordship Abdul Hamid FJ (as he then was) in delivering the judgment of the Federal Court *inter alia* stated that where it is necessary and justice of the case requires it, the court should be at liberty to reopen the e case and this is particularly so where there has only been a provisional order and this is done to perfect an order.

Having analysed the above cited cases a clearer picture is formed on the governing principles as to when and in what circumstances the court may alter, f vary or amend a judgment or an order pronounced though not perfected. Such governing principles in my view can be outlined as follows:

1. The application to recall the judgment or order for the purpose of reviewing it must be done expeditiously.

g 2. Having regard to the extensive rights of appeal the power to recall an order which has not been passed and entered should be sparingly exercised if such issues for further consideration can be left to be dealt with by way of appeal to the Court of Appeal.

h 3. There must be an intervening act or event from the day the order was pronounced to the day when the order was recalled for review and that an unperfected order is recalled when there is some doubt regarding the correctness of the order as orally pronounced.

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4. Where it is necessary and the justice of the case requires it to be reviewed and when a judge reopened the case with a view to perfecting the order.

Based on the above stated governing principles and taking into consideration the facts and circumstances of the present case it is my finding that the learned Sessions Judge was empowered and justified in varying the order for costs when the order had not been perfected. I am of the view that an order pronounced by a judge whether in open court or in chambers can always be withdrawn, altered or modified by him either on his own initiative or on the application of a party until such time as the order has been drawn up, passed and entered. When a judge has pronounced judgment and make any order he retains control over the case until the order giving effect to his judgment is formally completed. However such control must be used in accordance with his discretion, exercised judicially and not capriciously.

In the present case even though there was a lapse of time from the day the order was pronounced on 28 January 1997 to the day when the order was called for review on 18 July 1997, I am of the view that it cannot be said that the decision to recall the order as to costs made by the Sessions Judge was not done expeditiously. It must be noted that in the present case the learned Sessions Judge did not take the initiative himself to recall the order earlier made but it was made upon the application of the respondent on account that there was a serious dispute as to the costs that the respondent was entitled to. In fact as soon as both the appellant and the respondent could not agree as to the costs payable to the respondent the matter was then referred to the learned Sessions Judge for him to review the said earlier order given. I am also of the view that the learned Sessions Judge was justified in recalling the said earlier order made by varying it to taxed costs having regard to the facts established before him and having acted in accordance with the relevant provision of the law as provided under O. 48 r. 9(2) of the SCR. I am further fortified by the view that the decision taken by the learned Sessions Judge to vary his order to taxed costs is necessitated by the justice of the case and he had rightly reopened the case with a view to perfecting the earlier order as to costs granted by him. This is so because there is a doubt as to the applicability and the enforceability of the order as to costs earlier granted by him in view of the fact that the judgment sum awarded to the respondent was RM207,742 and the maximum that can be allowed under the fixed scale of costs as provided under O. 48 r. 12 of the SCR is only for judgment sum not exceeding RM100,000. To limit the amount of costs that the respondent would be entitled to only up to the maximum amount of RM100,000 would cause injustice to the respondent. Ideally the amendment to increase the jurisdiction of the Sessions Court to make unlimited awards in running down

cases should be correlated to the scale as reflected under O. 48 r. 12 of the SCR. However that is not the state of position of the law at the moment under the said SCR. In the circumstances of the case I find that the learned Sessions Judge was justified in exercising his discretion to vary the costs awarded earlier to taxed costs. I am of the view before the Sessions Court in appropriate cases where costs cannot be agreed or for some other reasons, costs can be ordered to be taxed. Taking into account the provisions of the law as set out under the SCR the fairest order as rightly made by the Sessions Judge in this case would be to order costs to be taxed perhaps following as closely as possible the scale set out under O. 48 r. 12 of the SCR and following closely the guidelines set out by VC George J (as he then was) in *Canopee Investment Pte Ltd & Ors v. Landmark Holdings Berhad & Ors* [1990] 1 CLJ 466; [1980] 1 MLJ 292 wherein his lordship held *inter alia* as follows:

> For purposes of taxation of costs, running down cases could be considered to be the simplest of cases and should attract for getting up the amount arrived at by applying the Subordinate Court Rules 1980 scale.

For the above stated reasons I thereby dismiss the appellant's appeal with cost and the decision of the Sessions Judge that the cost so awarded be varied to taxed cost is affirmed.